IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 26TH SEPTEMBER 2007 / 4TH ASWINA 1929

SA.No. 651 of 1994()

AS.15/1993 of DISTRICT COURT, THRISSUR
OS.535/1991 of MUNSIFF COURT,CHAVAKKAD

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APPELLANT/APPELLANT/PLAINTIFF:

PRABHAKARA MENON,
S/O.KOTTEKKAT KUNJILAKSHMI AMMA,
PALLIPURAM AMSOM AND DESOM,
VALAPPAD VILLAGE, CHAVAKKAD TALUK.

BY ADV. SRI.N.P.SAMUEL

RESPONDENT/RESPONDENT/DEFENDANT:

VISWAMBHARAN,
S/O.CHANNASSERY KUNJANDI,
PAPPINIVATTOM VILLAGE AND DESOM,
KODUNGALLUR TALUK,
THRISSUR DISTRICT.

BY ADV. SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 26/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 651 OF 1994

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DATED THIS THE 26th DAY OF SEPTEMBER, 2007

JUDGMENT

Appellant is the plaintiff and respondent, the defendant in a suit for realisation of the amount due under a promissory note. Appellant was the Headmaster and respondent, a teacher. Respondent admittedly borrowed Rs.5000/- from the appellant and executed Ext.A1 promissory note agreeing to repay the same on demand with interest at the rate of 18% per annum, on 11.8.1988. Respondent did not repay the amount on demand. Appellant sent Ext.A2 notice on 26.5.1990 demanding the amount. Respondent neither paid the amount nor send a reply. The suit was instituted on 20.9.1991 contending that respondent paid Rs.300/- on 11.2.1991 and made an acknowledgment on the reverse side of Ext.A1 and therefore suit is not barred by limitation as the period is to be computed from the date of acknowledgment. Respondent in the written statement denied the payment of Rs.300/- and the acknowledgment made. It was contended that the acknowledgment was concocted by appellant and suit is barred by time. Appellant did not take any steps to send Ext.A1 to an expert to compare the signature of the

respondent, with the signature seen on the reverse side of Ext.A1. Appellant was examined as PW1, respondent as DW1. Exts.A1 and A2 on the side of appellant and B1 to B5 letters admittedly sent by appellant to respondent were marked on the side of respondent.

2. Learned Munsiff, on the evidence found that the burden to prove that acknowledgment found on the reverse side of Ext.A1 is that of respondent is on the appellant. Comparing the signature with the admitted signatures of respondent seen in the records, learned Munsiff found that the signature do not tally. Learned Munsiff also found that Ext.B5 letter was sent by appellant on 26.4.1991, after the date of the disputed acknowledgment seen in Ext.A1 and nothing is mentioned about the payment made by respondent on 11.2.1991 or any other date in Ext.B4 and disbelieved the case of appellant that respondent paid Rs.300/- on 11.2.1991 or made the acknowledgment. Suit was dismissed as barred by time. Appellant challenged the decree and judgment before District Court, Thrissur in A.S.15 of 1993. Before the appellate court, appellant contended that an opportunity is to be granted to send Ext.A1 to an expert to compare the signature with the admitted signature of respondent. First appellate court did not allow the prayer and

instead on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1. Is it safe for the trial court to compare the handwriting and signature of respondent in Ext.A1 promissory note to decide whether the acknowledgment was made by respondent without getting an opinion from an expert.

2. Whether the findings of courts below that respondent did not make the acknowledgment is sustainable in the light of the evidence and broad probabilities of the case.

4. Learned counsel appearing for appellant and respondent were heard. The argument of the learned counsel appearing for appellant is that respondent admitted execution of Ext.A1 promissory note as well as the amount borrowed and receipt of Ext.A2 lawyer notice. It was pointed out that even though Ext.A2 notice was sent by appellant on 26.5.1990, no suit was filed immediately to afford opportunity to repay the amount by sending Ext.B1 to B5 letters and such a person will not concoct an acknowledgment and institute a false suit especially when he is a Headmaster. It was also argued that on

11.2.1991, the suit was not barred by time and therefore there was no necessity to forge an acknowledgment on 11.2.1991 and file a suit after seven months from that date and courts below should not have found that acknowledgment in Ext.A1 is not made by respondent. It was also argued that in any event, courts below should not have decided the issue on comparing the signature, without getting an opinion from an expert and at least first appellate court should have granted an opportunity to get the report of an expert and the findings of courts below are to be set aside.

5. Learned counsel appearing for respondent argued that appellant did not want the acknowledgment to be examined by an expert before the trial court and wanted the disputed signature in the acknowledgment to be compared by the court and under Section 73 of Evidence Act, court is competent to compare the signature and come to its own conclusion and both the trial court and first appellate court compared the signature and found that the signature in the acknowledgment is not that of the respondent and therefore there is no reason to interfere with the findings. It was also argued that as per Ext.A1, acknowledgment was made on 11.2.1991 and Ext.B5 letter was sent by appellant on 26.4.1991 and there is no whisper in Ext.B5

that any payment was received by respondent and in such circumstances courts below rightly disbelieved the case of appellant and found that the suit is barred by time and therefore there is no reason to interfere with the decree.

6. As Ext.A1 promissory note was executed and amount was borrowed on 11.8.1988. The suit was filed only on 20.9.1991. If there was no acknowledgment, the suit is clearly barred by time. The fate of the suit depends on the disputed acknowledgment. Appellant was aware of that fact. It is for that reason in the plaint itself it was contended that respondent paid Rs.300/- towards the amount due and acknowledged the payment in Ext.A1 promissory note. In his written statement, when execution of the promissory note and the consideration was admitted, it was specifically pleaded that he did not make any payment either on 11.2.1991 or on any other date and he did not make the acknowledgement on the reverse side of Ext.A1. In spite of this contention, appellant did not think it necessary to send the disputed acknowledgment to an expert for comparison. According to appellant, nobody else was present either at the time of payment or making the disputed acknowledgement in Ext.A1. Therefore appellant was aware that the disputed acknowledgement could be proved only by his oral evidence or

by comparing the signature seen in Ext.A1 with the admitted signature of respondent. In such circumstances, it is futile for appellant at the first appellate court to seek a remand to send Ext.A1 to an expert for comparison. Therefore for the failure of appellate court to send Ext.A1 to an expert, findings of courts below cannot be interfered.

7. The question is whether on the evidence the disputed acknowledgement seen on the reverse side of Ext.A1 is proved to be that of the respondent. If the argument of learned counsel is to be accepted, such an argument can be advanced in respect of any fabricated acknowledgement, because a valid acknowledgement can only be one made during the subsistence of the period of limitation. If the argument is that why the appellant waited till the date of acknowledgement or did not chose another date, such an argument is available in respect of any acknowledgement made on any day. Therefore for the reason that suit is not barred on 11.2.1991, it is not possible to accept the case that the acknowledgement is genuine. As rightly found by courts below when a definite question was put to PW1 on the difference of the admitted signature in the first page o Ext.A1 and the disputed signature on the reverse side, the evidence of PW1 was that he cannot say. He did not assert that

both signatures are similar. A comparison of the disputed signature with the admitted signature in Ext.A1 does not persuade me to take a different view than what was taken by the courts below. If in fact there was a payment as seen on the reverse side of Ext.A1, at least in Ext.B5 letter sent by appellant thereafter, a mention would have been made about payment of a portion of the amount either principal or interest and a demand for the balance. It is also for the absence of such a version in Ext.B5, courts below took the view that the acknowledgement is not genuine. That factual finding cannot be interfered, even if evidence is reappreciated. In such circumstances, there is no merit in the appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-